No. 21987

United States Court of Appeals

for the Ninth Circuit

NATHAN FRED MARKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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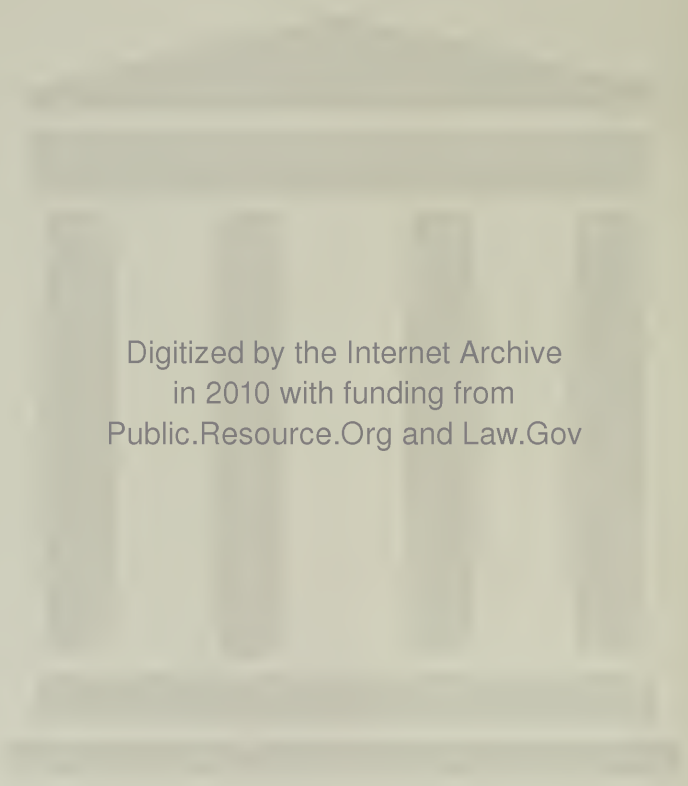

INDEX

INDEX OF CITATIONS
CASES CITED

INDEX OF CITATIONS
CASES CITED (Continued)

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OPINION BELOW

The Opinion of the District Court denying appellant's motion for a judgment of acquittal and, in the alternative, for a new trial, is contained on pages 98

through 101 of the District Court Clerk's transcript of record in the Court of Appeals.[1]

COUNTER-STATEMENT OF THE CASE

On February 25, 1966, an indictment in three counts was filed against appellant in the United States District Court for the District of Oregon, charging that he had willfully attempted to evade his income taxes for the years 1961, 1962 and 1963 by filing fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. (CT 1-3). After a jury trial lasting over five days, appellant was found guilty on Count I and not guilty on Counts II and III. On November 25, 1966, the District Court (Honorable John F. Kilkenny) sentenced appellant to five years imprisonment on condition that appellant be confined in a jail-type institution for four months, the remainder of the sentence being suspended and appellant placed on probation. (CT 102).

The evidence to support the verdict of guilt may be briefly summarized as follows:

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[1] References to the District Court Clerk's Transcript of Record will be designated "CT." References to the four volumes of trial testimony will be designated by volume and page number, as for example: "Vol. I, p. 1." References to government exhibits will be designated "Ex."; references to defendant's exhibits will be designated "Def. Ex."

During the prosecution years (1961-1963), appellant's principal business activity and source of income, as reported on his tax returns, was that of "registered lobbyist." (Exs. 3, 4, 5). According to appellant, he also engaged in property development and mining. (Vol. IV, p. 774). Appellant's tax returns for these years were prepared by a certified public accountant and attorney, Richard C. Kneeland. (Vol. I, pp. 34-35). Kneeland prepared the returns on the basis of monthly summaries of income and expenses furnished to him by appellant. (Vol. I, pp. 39, 71).

For the year 1961, appellant filed three tax returns which reflected his income and expenses in that year, viz: (1) the individual joint income tax return which showed a taxable loss of $178.91 and no tax due (Ex. 3); (2) a corporate income tax return in the name of the Hetty Marks Foundation which showed a taxable loss of $3,599.14 and no tax due (Ex. 7); and (3) a corporate income tax return in the name of the Royal Acceptance Corporation which showed a taxable loss of $2.84 and no tax due (Ex. 17). The Hetty Marks Foundation was a corporation formed in 1960 by Kneeland on behalf of appellant. (Vol. I, p. 40). This corporation, according to Kneeland, was founded as a charitable organization but never did any charitable business or any business at all. (Vol. I, pp. 41, 45). Appellant's personal residence and automobile were

in the name of the Hetty Marks Foundation, and he maintained a bank account in that name for a short period. (Vol. I, p. 41; Vol. III, pp. 566, 570, 575, 582). Appellant, during the investigation of his tax affairs, informed Special Agent Albert Deschene that the Hetty Marks Foundation was a "dummy corporation" which was used by him as a vehicle "to help him promote his financing." (Vol. III, pp. 569, 582). Although corporate returns for the Hetty Marks Foundation were filed for the years 1962 and 1963 (Exs. 8, 9), Kneeland testified that these returns were simply in the nature of information returns and showed no income or expenses, which were more properly shown on appellant's individual returns in those years. (Vol. I, pp. 43-44). The Government accordingly treated all income and expenses shown on the 1961 Hetty Marks Foundation corporate tax return as the personal income and expenses of appellant. (Vol. I, p. 44; Vol. III, p. 646). This same procedure of attributing income and expenses to appellant personally was used with respect to the income and expenses reflected on the corporate tax return of the Royal Acceptance Corporation. This corporation was also formed by Kneeland on behalf of appellant in 1960 (Ex. 60b) for the stated purpose of engaging in real estate promotions — but as in the case of the Hetty Marks Foundation — did no corporate business. (Vol. I, pp. 45-46; Vol. III, pp. 594-595). Monies received by appellant in the prosecution year 1961 were re-

ported by him either in the corporate tax returns of the Hetty Marks Foundation or the Royal Acceptance Corporation, and the total gross income on appellant's individual return, totalling $3,101.01, was comprised of "salaries and wages" which — according to the corporate tax returns — appellant purportedly received from the two corporations. (Exs. 3, 7, 17, 150).

During the trial, the government introduced evidence to prove that for the year 1961 appellant had failed to report as gross income a total of $6,355.00 received from the following individuals in the amounts listed:

1.	Floyd Persons	$4,000.00
2.	Ford M. Converse	850.00
3.	Rudy Gross and Union Finance Co.	750.00
4.	Glenn Morningstar	755.00

Appellant maintained at trial that the monies listed above did not constitute taxable income but rather were received by him as loans from the individuals named. The government, on the other hand, took the position at trial that the monies listed above constituted taxable income to appellant under either or both of two theories: (1) that these monies were received

by appellant as compensation for services rendered or to be rendered by him; or (2) that appellant received these monies under false pretenses, that he caused these funds to be applied to his own personal use and benefit under circumstances and conditions inconsistent with a loan, and that in so doing, he realized taxable income (Vol. IV, pp. 944-945).

The evidence pertaining to each of the above omissions in gross income may be summarized as follows:

1. *Floyd Persons*

Floyd Persons, who was in the mining business, first met appellant in the Spring of 1961. (Vol. I, p. 76). At that time, Persons owned some "Valentine scrip", which he was trying to exchange for government grazing land or timberland. (Vol. I, p. 79). Appellant represented to Persons that he could obtain government land patents in exchange for the scrip owned by Persons. (Vol. I, p. 77). He also represented to Persons that he had influence with people in Washington, D. C.; that he was a lobbyist there; that "he knew the Kennedys real well"; and that "he knew the Secretary of the Interior". (Vol. I, pp. 80-81). Appellant told Persons that he would need "expense money" to go back to Washington, D. C. "to see what he could do" and Persons paid over $1,200.00 to ap-

pellant for this purpose. (Vol. I, pp. 77-79). About a week later, appellant returned $1,000.00 of this money to Persons and told Persons that he "couldn't do anything" with the money Persons had previously given him, and that "he had to have more money * * * to buy certain people off" in Washington, D.C. (Vol. I, p. 80).[2] Shortly thereafter, Persons paid over to appellant an additional $5,000.00 in currency for this purpose. (Vol. I, p. 80). Persons had borrowed the $5,000.00 on April 14, 1961 from Mr. and Mrs. B. H. Hamilton, and Persons — together with appellant — signed a note promising to repay this money plus six percent interest by no later than May 1, 1961. (Ex. 44). Persons and appellant agreed that if appellant was successful in obtaining the land patents, he would receive 10% of the value of the land and timber. (Vol. I, p. 82). While appellant "guaranteed" that he would obtain the land patents, it was further agreed between Persons and appellant that the money would be returned if the patents were not obtained. (Vol. I, p. 82). In connection with his ability to repay this money, appellant told Persons that "he was in a large business"; that he "was representing the Hetty Marks Foundation from back East"; that this foundation was "in the business of loaning money"; that he had a brother, Harry Marks, who was "President of the Chase-

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[2] Appellant, when testifying at the trial, denied that he had a conversation with Persons about buying people off in Washington, D. C. (Vol. IV, p. 812).

Manhattan Bank of New York"; and he and/or "the family" were "instrumental" in loaning the owner of the Albertson Food Stores "around two million dollars". (Vol. I, pp. 83-85).

In addition to the $5,000 paid over to appellant by Persons, the latter paid over $200.00 more to appellant later that year. (Vol. I, p. 85).

Appellant never obtained the land patents for Persons. Persons tried repeatedly to contact appellant about these matters without success. (Vol. I, p. 87). In May 1962, after obtaining an assignment of the $5,000 note from Mr. and Mrs. Hamilton, Persons retained an attorney, Ralph J. Shepherd, in an effort to collect the $5,000 paid over to appellant, which was then one year overdue in payment. (Vol. I, p. 106). Shepherd wrote a letter to appellant demanding payment in full of the principal of the note plus six percent interest. (Ex. 28 BB). Appellant responded to Shepherd's letter as follows:
(Ex. 43)

> "Phelps, Nelson & Shepherd,
> 817 Equitable Building,
> Portland 4, Oregon
>
> RE: Floyd Persons & B. H. Hamilton note for $5,000.00
>
> Gentlemen:

> Apparently, Mr. Floyd Persons neglected to tell you that he signed a contract and a counter note releasing me from all liability for and repayment of the note executed April 14, 1961 in the sum of $5,000.00 payable to B. H. and Esther Hamilton and also all liability for repayment to Mr. Floyd Persons on this note in lieu of various services rendered to Mr. Floyd Persons over a period of more than a year under a series of requests for my personal services for his different ventures.
>
> There is no basis for legal action of any kind according to my lawyer, and I sincerely hope this clears this matter up for your files."

A few weeks later, Persons filed a complaint against appellant in the Multnomah County Court, demanding payment of the $5,000 promissory note plus interest. (Ex. 44D). Appellant filed an answer to the complaint denying liability. (Ex. 44D). After attorney Shepherd discovered that appellant was "judgment proof" (Vol. I, p. 109), no further action was taken on the complaint and it was dismissed for want of prosecution in July 1963. (Ex. 44D).

Some time after Persons had filed the lawsuit, appellant told Persons to get the "lawsuit off my back" and the $5,000.00 would be paid back. (Vol. I, pp. 90-91). On his next meeting with Persons, however, appellant stated that he "didn't owe * * * any money" to Persons. (Vol. I, p. 91).

No part of the $5,000.00 received from Persons was reported by appellant as gross income on his 1961 tax return.[3]

To support its position that the $5,000 received by appellant from Persons constituted either income for services rendered or monies obtained by fraud and applied by appellant to his own personal use under circumstances inconsistent with a loan, the Government, in addition to the evidence above, introduced evidence that appellant — contrary to his representations to Persons — did not know Senator Robert Kennedy or Secretary of the Interior Stuart Udall (Vol. III, pp. 625-626); that appellant had never met and was not instrumental in loaning any money to J. I. Albertson, owner of Albertsons Food Stores (Vol. I, pp. 103-104); that appellant's brother, Harry

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[3] Appellant did report as gross income on the Hetty Marks Foundation corporate tax return the initial $1,200.00 he received from Persons, but since $1,000.00 of this amount was later returned by appellant to Persons, appellant was obligated to report only $200.00 as gross income. Appellant's accountant, Richard Kneeland, failed to take account of the $1,000.00 repayment to Persons, and accordingly overreported gross income by $1,000.00 on this transaction. (See appellant's Brief, pp. 26-27). As related above, appellant received an additional $200.00 from Persons in late 1961 and this amount was reported as gross income on the corporate tax return of the Royal Acceptance Corporation. (Ex. 150, p. 3). Since appellant — through Kneeland's mistake — overreported gross income by $1,000.00, on the transaction previously mentioned, the government charged appellant with $4,000.00 — and not $5,000.00 — of unreported income resulting from the omission of the $5,000.00 in currency received from Persons. (Ex. 150, p. 3).

Marks, never was "Chairman of the Board of Directors of the Chase-Manhattan Bank" (Vol. I, p. 163); that the Hetty Marks Foundation was a dummy corporation and had never loaned any money to anybody (Vol. I, pp. 44-45; Vol. III, pp. 569-582); that the alleged loan from Persons was not listed as a debt or liability in three separate applications for personal loans filed by appellant with lending institutions in September 1963, March 1964 and September 1964, respectively (Exs. 58, 119); that it was only after the commencement of a fraud investigation by Special Agent Albert Deschene in August 1964, that appellant — in what the Government contended was an effort to fabricate a loan defense — filed a loan application in September, 1965, in which the alleged loan from Persons was listed as a debt (Vol. III, pp. 542-545, 564, Ex. 140); that it was again after the commencement of the fraud investigation by Agent Deschene that appellant, for the first time, paid over to Persons as a repayment on the alleged loan $2,000.00 in 1965 and $500.00 in 1966 (Vol. I, pp. 91-92); that appellant told Agent Deschene during the investigation that he had performed services for Persons by contacting Mr. Karl Landstrom, Assistant to the Secretary of the Interior in Washington, D. C. — allegedly as part of his efforts to obtain Government land for Persons in exchange for scrip (Vol. IV, p. 573); that Karl Landstrom, when called as a Government witness, denied to the best of his knowledge

ever meeting appellant or having any such contact with appellant for such a purpose (Vol. III, pp. 620-623); and finally, that appellant admitted to the special agent during the investigation that the monies received from Persons were for services rendered. (Vol. III, pp. 574, 578, 584, 597).

2. *Ford Converse*

Mr. Converse, who is a retired lumberman,[4] also owned (as in the case of Flody Persons, *supra*) some scrip which he wished to exchange for Government land. (Vol. I, pp. 111-112). Converse testified that he paid over $2,250[5] to appellant in 1961 (Ex. 133;

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[4] As is evident from the record, Mr. Converse, at the time of trial, was quite elderly and had difficulty in both understanding and answering the questions which were asked. (Vol. I, pp. 114-120).

[5] In his brief (BR. 31-33), appellant states that the evidence established that Converse paid over to appellant only $2,050.00 and not $2,250.00, as claimed by the government. The government's evidence is contained in Exhibit 133, which is comprised of certain original checks paid over by Converse to appellant. We have again examined this exhibit in preparing this Brief, and this exhibit consists of nine original checks drawn by Converse during the year 1961, and which do total $2,250.00, as the government contended at trial. Appellant, in his Brief (BR. 31), erroneously states that this exhibit consists of "photocopies of 8 checks" drawn in 1961. Prior to trial, the government furnished appellant's counsel with photocopies of all exhibits which the government intended to introduce into evidence. It may be that the photocopied exhibit given to defense counsel omitted one check, thereby resulting in the $200.00 difference referred to by appellant.

Vol. I, p. 113), in return for which appellant was to use his best efforts in obtaining Government land for Converse in exchange for his scrip. (Vol. I, pp. 112-113). Appellant never obtained any land patents for Converse (Vol. I, p. 115), and Converse, after trying unsuccessfully to contact appellant, then attempted to get his money back with the assistance of his friend, Floyd Persons (Def. Ex. 224). Converse never did recover any money from appellant but stated at the trial on cross examination that — since he didn't get any scrip — he expected to get his money back (Vol. I, p. 120). Of the $2,250 received by him, appellant reported a total of $1,400 as income, viz: $700.00 on the tax return of the Royal Acceptance Corporation and $700.00 on the Hetty Marks Foundation corporate tax return (Ex. 150, p. 3).

No part of any monies received by appellant from Converse was ever listed by appellant as a liability or debt in any of the five separate loan applications filed by him with lending institutions during the years 1963, 1964, 1965 and 1966 (Exs. 58, 119, 140). Nor was any part of these monies listed as a debt or liability owed by appellant in a list of liabilities prepared by appellant's wife and furnished by appellant to the Special Agent in August 1964. (Vol. II, pp. 575-577, Ex. 28M). During the revenue investigation, appellant

admitted to the Special Agent that the additional $850 received from Converse, which he failed to report on his return, constituted "income for services". (Vol. III, pp. 578, 597).

3. *Rudy Gross and the Union Finance Company*

During the year 1961, Mr. Gross was the President of Union Finance Company (Vol. II, p. 263). At that time, his company was in need of financial assistance. (Vol. II, p. 264). Appellant told Gross that he (appellant) could obtain financing through his brother, Harry Marks, and "connections back East". (Vol. II, pp. 264-265). Gross paid over to appellant some $3,000.00 for this purpose.[6] Appellant, who never obtained any financing for Gross and Union Finance Co. (Vol. II, p. 266), told Gross that he had endeavored to obtain the financing through "various syndicates and his brother Harry Marks." (Vol. II, p. 272).

Appellant's brother, Harry Marks, who was called as a Government witness, testified that he had never been approached by his brother to obtain funds for him and had had no business connections with his brother for the past fifteen years. (Vol. I, pp. 162, 164).

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[6] These monies were reported by appellant in the corporate tax returns of the Hetty Marks Foundation and the Royal Acceptance Corporation. (Ex. 150, p. 3).

In November, 1961, the Union Finance Company through Gross — in addition to the monies previously mentioned — paid over to appellant $929.00 in the form of an interest bearing loan to be repaid by appellant at the rate of $89.69 per month (Ex. 111). Appellant told Gross that he (appellant) wished to borrow this money "to pay some personal bills" (Vol. II, p. 271).

After receiving this money, appellant failed to make any payments on the promissory note he signed in connection with the alleged loan (Ex. 111). Efforts made by Union Finance Co. to obtain payments on the note were unsuccessful and the note was eventually assigned to Investment Service Co. after Union Finance Co. went into bankruptcy (Ex. 111). In November, 1962, Investment Service Co. made formal demand of appellant for payment of the monies due on the note (Ex. 111). On December 4, 1962, appellant replied by letter as follows (Ex. 111, p. 2):

> "Gentlemen:
>
> "This is in reply to your letter of November 26, 1962. Your demand was a little shocking. I had heard that Union Finance Co. was in receivership.
>
> "I enclose herewith my statement for services rendered for and at the request of Union Finance Co. My records are very detailed. I

have various files and papers to show and to prove work done on this account. During this time I also contacted The United States National Bank, so my work will not be a new item.

"The note was signed at the request of the Union Finance Co., in fact the funds were used on the Nov. 23rd through Dec. 2 trip to Washington, D. C. It was to be cancelled out after my return. I therefore take the position that my trip expenses have not been paid.

"I hereby make demand for payment of the sum of $6,500.00 plus the further sum of $1,136.48 due on the note. If full payment is not received within 10 days, I will refer the matter for collection."

Thereafter, on December 15, 1962, appellant again wrote to Investment Service Co. renewing his demand for payment "for services rendered", and threatened a lawsuit if payment was not forthcoming. (Ex. 111). Such a lawsuit was filed by appellant on January 7, 1963, requesting judgment against the co-defendants Union Finance Co. and its assignee United States National Bank in the sum of $6,500.00 for "fees and expenses" allegedly earned by appellant, as stated in the complaint, "as consultant for the purpose of obtaining funds to refinance the defendant Union Finance Co." (Ex. 111).

No part of the $929.00 received by appellant was reported by him as gross income on his tax return.[7]

At the trial, appellant claimed that the $929.00 received from Union Finance Company was a loan and therefore properly excludible from gross income. (Def. Ex. 258). The Government's evidence established that this alleged loan was not listed by appellant as a liability or debt in any of five separate loan applications filed by him with lending institutions during the years 1963, 1964, 1965 and 1966 (Exs. 58, 119, 140). Nor was any part of these mones listed as a debt or liability owed by appellant in a list of liabilities prepared by appellant's wife and furnished by appellant to the Special Agent in August, 1964 (Vol. II, pp. 575-577, Ex. 28M). During the revenue investigation, appellant admitted to the Special Agent that all the monies received from Rudy Gross and the Union Finance Co. were "for services". (Vol. III, p. 584).

4. *Glen Morningstar*

Mr. Morningstar, a cabinetmaker, testified that he

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[7] Of the total amount of $3,969.74 received by appellant from Gross and Union Finance Co., appellant reported $3,219.74, thereby leaving unreported income of $750.00, and not $929.00, the amount of the alleged loan. The discrepancy is due to a bookkeeping error made by appellant's accountant, Richard Kneeland, which resulted in overposting by $179.00 income received from Gross and Union Finance Co. Accordingly, the amount of $929.00 which appellant failed to report was reduced by $179.00, leaving an understatement of $750.00 (Ex. 150, p. 3)

paid over to appellant a total of $1,050.00 in the year 1961 comprised of $750.00 in checks and $300.00 in currency (Vol. II, pp. 250-251; Ext. 122). Appellant told Morningstar that, in return for these monies, he (appellant) would promote "a timber and mining deal" for their benefit at Gold Beach, Oregon, and that he would "set up a little cafe in" Gresham, Oregon, for Morningstar's wife (Vol. II, pp. 252-253). For these and other alleged purposes, three corporations were formed by appellant for Morningstar; none of which—according to Morningstar—ever did any business (Vol. II, pp. 248-250, 251-253, 254). Morningstar stated that the cafe which appellant was to set up for Morningstar's wife "never went through" and "nothing ever came" out of any of these transactions (Vol. II, pp. 253, 256). Morningstar further testified that, from his contact with appellant, it was his understanding that the Hetty Marks Foundation was supposed to have "a lot of money" and that appellant was "a friend" of Jimmy Hoffa (Vol. II, pp. 253-254, 255). The government's evidence established that the Hetty Marks Foundation was simply a "dummy corporation" with no substantial assets (Vol. I, pp. 44-45; Vol. III, pp. 569, 582), and that Jimmy Hoffa had never met, and did not know the appellant (Vol. III, p. 626).

On cross-examination, Morningstar, in reply to questions concerning the $300.00 in currency he paid over

to appellant, stated the purpose of "most of these payments" was to buy gas to go to Seattle with appellant who "had some business dealings in Seattle." (Vol. II, p. 261) Morningstar further testified that his function on such trips was to drive the car for appellant, and Morningstar specifically stated that he did not consider such payments to be "loans" to appellent. (Vol. II, p. 261). Of the $1,050.00 paid over by Morningstar to appellant in 1961, appellant reported $250.00 as income in the tax return of the Royal Acceptance Corporation, leaving unreported income of $755.00 (Ex. 150, pg. 3).

On the last day of testimony at the trial (Vol. IV, p. 896), and several days after Morningstar had testtified (Vol. II, p. 247), Mrs. Marks, in support of appellant's loan defense, stated that during the years 1959 and 1960, appellant—who at that time owned and operated the M & M Salvage Co.—had advanced "various amounts" to Morningstar for the purpose of setting up a "junk yard"; that, in return for these alleged advances, Mr. and Mrs. Morningstar allegedly signed a document on November 16, 1960, recognizing the liability (Vol. IV, pp. 898-899; Def. Ex. 274); and that the $1,050.00 which Morningstar paid over to appellant in 1961 "was a repayment of" the money allegedly advanced to Morningstar in earlier years (Vol. IV, pp. 896-899).

When Morningstar had testified as a government witness earlier in the trial, no questions were asked of him on cross-examination concerning this alleged loan (Vol. II, pp. 257-261). Morningstar had testified on direct examination as a government witness that, aside from $100.00 which he received from appellant in 1960, the only other monies he had received from appellant consisted of "about $25 at a time *** on a couple of occasions." (Vol. II, p. 256). Neither Mr. nor Mrs. Morningstar was called by appellant as a witness to corroborate the testimony of appellant's wife concerning the alleged loan.

To further rebut the loan defense, the government's evidence established that appellant reported as income $250.00 of the $1,050.00 received from Morningstar (Ex. 150, p. 3); that no part of any monies received by appellant from Morningstar was ever listed by him as a liability or debt in any of the five separate loan applications filed by him with lending institutions during the years 1963, 1964, 1965 and 1966 (Exs. 58, 119, 140); that no part of these monies was listed as a debt or liability owed by appellant in a list of liabilities prepared by appellant's wife and furnished by appellant to the Special Agent in August, 1964 (Vol. II, pp. 575-577, Ex. 28M).

As previously stated, appellant reported a negative taxable income of $178.91 and no tax due on his 1961 tax return (Ex. 3).

Based upon the above omissions from gross income amounting to $6,355.00, and after allowing all deductions claimed by appellant (Vol. IV, pp. 876-879, 888-893; Ex. 154), it was the government's contention that appellant had a corrected taxable income of $2,099.81 and a corrected tax liability of $419.96 (Exs. 150,-55).[8]

Aside from the above omissions from income, further evidence of appellant's wilful intent to evade taxes is set forth in Argument I, *infra,* concerning the sufficiency of the evidence to support the verdict, to which the Court is respectfully referred.

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[8] Appellant, in his brief (BR. 16, Appendix A) correctly points out that the government's expert witness made a technical error in his computation of taxable income and tax for the year 1961. This error arose after the government's technical expert, Mr. Klass, made a revised computation of taxable income after Judge Kilkenny had ruled that certain monies received by appellant in the year 1961 from one Alton Glenn did not constitute taxable income to appellant and should be eliminated from the case. (Vol. IV, pp. 909-916, 923). Mr. Klass mistakenly deducted the amount received by appellant from Glenn ($7,412.50) from taxable income instead of from the adjusted gross income. (See Exhibit 55). By virtue of the limitation on medical expense deductions, which are limited to those in excess of 3% of adjusted gross income, Mr. Klass's error resulted in overstating appellant's taxable income by $222.38 and his tax by $44.47. Accordingly, appellant's corrected taxable income is $1,877.43 (and not $2,099.81), and appellant's corrected tax liability is $375.49 (and not $419.96). This error was overlooked by both sides during the trial and was not called to the attention of either the jury or the District Court. However, we have used the lower and correct figures for taxable income and tax throughout the remainder of this brief.

Following the jury's verdict of guilt for the years 1961, appellant filed a Motion for judgment of acquittal and, in the alternative, for a new trial, which was denied by the District Court *inter alia* as follows (CT 98-101):

> "This matter is before the Court on defendant's motion for a judgment of acquittal and, in the alternate, for a new trial.
>
> "At the outset, I express the view that the defendant, on the record in this case, could well be likened to a miniature Ponzi. That in his relations with his victims, as shown by the testimony, he was a common cheat and a complete fraud, there is no doubt. How successful he was in his fraudulent schemes is clearly demonstrated by the fact that he ensnared not only the innocent, but also the "sharpies," including attorneys on the road to disbarrment for somewhat similar schemes. His acquittal on Counts Two and Three, in my opinion, can only be explained by the "blast" of the United States Court of Appeals for the Ninth Circuit against the Government's principal witness.[9] This "blast" appeared in newspapers of wide circulation and on TV and radio on the fourth day of the trial.
>
> "Although I carefully cautioned the members of the jury against reading anything in the newspapers or listening to anything on TV or the radio about this case, I did not anticipate that the chief Government witness in this case would be roundly criticized in connection with his testimony in another tax case. That some,

if not all, of the members of the jury read or listened to this criticism is beyond question. listened to this criticism is beyond question.[9] (Footnote ours)

"Be that as it may, defendant was convicted on only one count to evade and defeat a substantial part of his income tax. Neither the jury, nor the Court, is concerned with the defendant's fraudulent conduct, except insofar as it relates to the count on which the defendant was convicted.

"One of the defendant's principal complaints is that Court did not inform the jury on the tax rate to be applied in computing the tax deficiency. It is evident that neither the Government, nor defendant's counsel, were of the belief that these schedules and rates should be submitted to the jury. No requested instructions on that point were submitted, nor was the question in any way raised by the defendant. Obviously, at the time of the trial, all participants, including the Court, felt that the tax deficiency, if any, was a subject for expert testimony. Manifestly, the theory that the rate schedules should have been submitted to the jury is an afterthought on the part of counsel for defendant. The trial of the case consumed in excess of five days. I do not believe that the defendant should be now permitted to raise this question.

[9] For the sake of clarity, we wish to respectfully point out that the "blast" referred to by Judge Kilkenny, was contained in the initial Opinion of this Court in *United States v. Lenske,* decided October 5, 1966. No. 19,539 and No. 20,448 (not officially reported) Although this opinion did not mention the Special Agent by name, the news media — as Judge Kilkenny states — picked up the Agent's name from the

"In any event, it is my view that it was not necessary for the Government to introduce evidence as to the exact amount of the additional tax due. The case is made when the Government presents substantial evidence from which the jury could find that a substantial amount of *net income* was not reported and that the failure to so report was willful and intentional. The amount of the additional income tax is not the important feature as long as it was a substantial sum. *Watts v. United States,* 212 F.2d 275 (10th Cir. 1954). Of similar import is *United States v. Nunan,* 236 F.2d 576 (2d Cir. 1956).

"On the record before me, there is substantial evidence on which the jury could find that the defendant had willfully failed to report over $2,000.00 in taxable income on this particular count. Of course, the tax on such unreported income would be substantial.

* * *

"I have carefully considered the voluminous briefs filed by counsel for defendant and have analyzed the cited cases. I am convinced that the case was properly submitted to the jury and that defendant had a fair trial.

* * *

"Therefore, the defendant's motion for a judgment of acquittal and, in the alternate, for a new trial, must be denied."

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record in the *Lenske* case and mentioned the Agent by name in its account of the *Lenske* opinion. This initial opinion in the *Lenske* case was later withdrawn in the Court's subsequent opinion of August 28, 1967, not yet officially reported. Both opinions are unofficially reported, respectively, in 66-2 CCH No. 9686 and 67-2 CCH No. 9631.

SUMMARY OF ARGUMENT

I.

The evidence, viewed in the light most favorable to the government, was sufficient to support the verdict. The crucial issue in the case in determining the existence of a tax deficiency was whether certain monies paid over to appellant during 1961, and not reported by him on his tax return, constituted taxable income or loans. The jury, by its verdict, obviously resolved this issue of fact against appellant after the respective positions of the parties had been clearly defined by statements of counsel, the testimony, and the trial Court's instructions. There was ample evidence to support the conclusion of the jury that a substantial part of the unreported income was received by appellant simply in the form of a "loan" but without any bona fide recognition on his part of a loan obligation.

II.

An additional factual issue in the case concerned the value of an alleged charitable contribution made by appellant in 1961 to the Rainbow Division of the Oregon City Police Department. This donation consisted of merchandise and fixtures of a second hand store operated by appellant under the name M & M Salvage Co. No such charitable contribution was claimed by appellant on his 1961 tax return, and

appellant accordingly had the burden of proving deductibility. Contrary to appellant's claim that the merchandise had a value of $2500.00, the government's evidence established (and the jury was warranted in finding) that it was of little if any value. Moreover, the trial Court was correct in holding that the affidavits submitted by appellant in support of his motion for new trial did not properly constitute newly discovered evidence and in any event were simply cumulative to evidence introduced at trial on the alleged charitable nature of the gift.

III.

The trial Court properly held that the government had proved a "substantial" tax deficiency. The jury was carefully and correctly instructed on the meaning of the term "substantial," and proof by the government of additional unreported taxable income of over $2000.00, when appellant had reported a taxable loss, clearly creates a "substantial" deficiency under the rationale of the decided cases.

IV.

There was no error in failing to inform the jury of the applicable rate of tax. This point was not raised by appellant in the District Court and there are no circumstances to warrant invocation of the "plain error"

rule. In any event, no error exists. The jury had before it, through the government's expert witness, the precise amount of unreported income and tax claimed by the government, and this was sufficient to establish a *prima facie* case. Since appellant claimed at trial that he had a lower unreported income than that shown by the government, the matter of the rate to be applied to this unreported income became a matter of defense. Moreover, where (as here) the government proves substantial unreported taxable income, it follows as a matter of law that there is a "substantial" tax deficiency.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

At the trial, the govenment had the burden of establishing: (1) a substantial tax deficiency and (2) a willful attempt by appellant to evade and defeat the tax. *Spies v. United States,* 317 U.S. 492. The District Court held that the jury had ample evidence before it to support their finding that appellant had willfully failed to report a substantial portion of his taxable income and tax (CT. 100).

Appellant, in his brief, argues that there was a failure of proof with respect to both the existence of a substantial tax deficiency and the element of wilfulness. In making these contentions, it is clear that appellant does no more than complain that the jury did not accept his version of the case. To support his defense that there was in fact little if any tax deficiency, appellant offered evidence that the monies received constituted loans and were properly not reportable by him on his tax returns. The government, to show the contrary, introduced evidence in support of its alternative theories that appellant received these monies either as compensation for personal services or by

means of fraudulent representations, and that he dealt with these monies under circumstances inconsistent with a loan. Each side, in its opening statements and closing arguments (Volume I, pp. 11-33), and the Trial Court in its instructions (Volume IV, pp. 942-947), made clear to the jury the respective contentions of the parties as to each element of the offense. The jury, by its verdict, rejected appellant's defense and, when viewed in the light most favorable to the government (*Glasser v. United States,* 315 U.S. 60, 80), the evidence was entirely ample to support the jury's verdict.

As shown above in the Counterstatement of the Case, appellant's willful omissions from gross income were established *inter alia* as follows: (1) The appellant failed to report in his 1961 tax return $850.00 of the $2,250.00 received by him from Ford Converse. (Ex. 150, p. 3) Converse testified that he paid over this money to appellant in order to obtain patents to land in exchange for scrip, and appellant had agreed to obtain these patents in return for the monies received. (Vol. I, pp. 111-113) Contrary to appellant's claim at the trial that all the monies received from Mr. Converse constituted loans, his own accountant, Mr. Kneeland, reported $1,400.00 of this money as income for the year 1961—$700.00 being reported as income on the tax return of Royal Acceptance Corporation and $700.00 listed as income on the tax return of the

Hetty Marks Foundations. (Exs. 23B, 150) Since Kneeland testified that he had instructed Mr. Marks to inform him of all receipts (loans or otherwise) and further testified that he based his income figures on information received from and discussed with Mr. Marks (Vol. I, pp. 38-39), it is clear that appellant omitted from income a substantial part of these monies received from Converse. (2) Appellant failed to report $750.00 received from Rudy Gross, President of the Union Finance Company (Ex. 150, p. 3) The Court will recall that this item formed part of an alleged loan of $929.00 received by appellant on November 21, 1961 (Vol. II, p. 271; Ex. 111) Appellant had obtained other monies from Mr. Gross and the Union Finance Company after making false representations that he could obtain financing from his eastern connections, including his brother, Harry Marks. (Vol. I, pp. 162, 164; Vol. II, p. 272) Appellant failed to make any payments on the promissory note he signed in connection with the alleged loan. (Ex. 111) When efforts were made to collect these monies in 1962, appellant characteristically repudiated the loan arrangement. In a letter of December 4, 1962, he claimed that the monies wrere received "for services rendered," and shortly thereafter instituted a law suit (later dismissed for want of prosecution) against Union Finance Company demanding an additional sum of $6,500.00 "for fees and expenses" allegedly incurred on behalf of Union Finance Company. (Ex.

111) (3) Appellant reported in his 1961 tax return only $250.00 of a total of $1,005.00 received from Glenn Morningstar (Ex. 150, p. 3) Appellant told Morningstar that, in return for these monies, Morningstar would have a part in the development of mining claims on certain property in Gold Beach, Oregon, and that Morningstar's wife would manage a cafe in Gresham which the appellant was allegedly going to establish. (Vol. II, pp. 252-253) For these alleged purposes, several corporations were formed by appellant, none of which—according to Morningstar—ever did any business or served any other function. (Vol. II, pp. 253, 256) Mr. Marks had falsely represented to Morningstar that he was a personal friend of Jimmy Hoffa. (Vol. II, p. 255; Vol. III, p. 626) He also led Morningstar to believe that, contrary to the truth, the Hetty Marks Foundation had substantial assets. (Vol. I, pp. 44-45; Vol. II, pp. 253-254; Vol. III, pp. 569, 582) The amounts received from Morningstar (except for certain insignificant amounts which we will further discuss below) did not even purport to be loans. No promissory note or other security was given by appellant to Morningstar, and appellant in fact reported to his accountant, Mr. Kneeland, a part of the amount received from Morningstar as income, not as a loan. (Ex. 150, p. 3) As in the case of Ford Converse, this was a pure and simple failure to report a substantial portion of gross receipts as income. (4) Appellant failed to report $4,000.00 in currency received from

Floyd Persons in the year 1961. (Ex. 150, p. 3) Persons testified that, during 1961, he paid over to appellant a total of $6,400.00, which was comprised of two checks for $1,200.00 and $200.00, respectively, and $5,000.00 in currency. (Vol. I, pp. 77-80, 85) One thousand dollars of this amount was returned by Mr. Marks to Persons, leaving a balance of $5,400.00, of which Mr. Marks failed to report $4,000.00. (Ex. 150, p. 3) The Court will recall that Persons borrowed the $5,000.00 which he gave to Mr. Marks from Mr. and Mrs. Hamilton. Persons and Marks both signed a promissory note to the Hamiltons for this amount, and Marks agreed to pay back the money to Persons. (Ex. 44) The appellant had procured the money from Persons on the basis of his representations that he would use this money for travel expenses and to "buy off" his alleged connections in Washington, D.C. in order to obtain land patents in exchange for scrip. (Vol. I, p. 80) He falsely represented to Persons that he was a friend of the Kennedys, Secretary of the Interior Udall, J. I. Albertson, of Albertson's Food Stores, that his brother Harry Marks was the President of the Chase Manhattan Bank, and that the Hetty Marks Foundation was a wealthy organization. (Vol. I, pp. 83-85, 103-104; Vol. III, pp. 625-626) Similar to the case of Rudy Gross, above, when Mr. Persons attempted to get back his money which he had been induced to part with in the form of a loan, appellant—in a letter to Persons' attorney—repudiated the loan

and claimed that the money was received in payment for "various services rendered" to Mr. Persons. (Ex. 43). Appellant maintained this position in defense to a lawsuit filed against him by Persons (Ex. 44D) which was eventually dismissed for want of prosecution since appellant was judgment proof. However, after the commencement of the revenue investigation of appellant in 1964, he then started to make payments to Persons the following year purportedly in repayment of the alleged loans. (Vol. I, pp. 91-92) The Persons transaction, as well as that of Rudy Gross, is a clear illustration of appellant's pattern of conduct, viz: induce the victim to part with the money by misrepresenting the true facts; place the transaction in the form of a loan to further lull the victim and to conceal taxable income from the Government; deny that the monies were loaned when efforts were made to collect; place assets in the names of a dummy corporation (such as the Hetty Marks Foundation) to become judgment proof, thereby frustrating potential creditors; and, upon discovery by the Internal Revenue Service that the monies obtained were not reported as income, again place the transacation in the guise of a "loan" by making what purported to be repayments of the "loan" in an effort to dissuade prosecution.

To further demonstrate that the monies received by appellant did not constitute loans, the government es-

tablished (See statement, *supra*) that appellant never recognized the existence of any loan obligations to either Converse, Persons, Morningstar or Gross in Financial Statements filed by him with various lending institutions (Exs. 58, 119, 140); and that he claimed such an obligation to Persons in a September 1965 loan application only after a Revenue Service investigation had commenced in an effort to forestall prosecution. (Vol. III, pp. 542-545, 564, Ex. 140) In addition to the foregoing evidence, the government introduced other proof of appellant's willful conduct and attempts to conceal taxable income from the government, by showing that he dealt extensively in currency (See eg. Vol. I, pp. 80, 212; Vol. II, pp. 267, 362, 347-348, 395-396; Vol. III, p. 548); that he maintained only one little-used bank account in the name of the Hetty Marks Foundation (Vol. I, pp. 41; Def. Ex. 249); that he made a statement to Mrs. Donna Schmaltz, an employee of a safe deposit box rental establishment, that he was having some difficulties with the the Interstate Commerce Commission and wanted to rent a box in an assumed name to conceal (as he sought to conceal income) papers from the Interstate Commerce Commission (Vol. III, pp. 535-536); that, as early as 1958, appellant was engaged in the same pattern of fraudulently inducing his victims to part with their money in the form of a loan when he obtained $3,000 in currency in that year from Mrs. Minnie Woolworth, which he

promised to pay back and never did. (Volume III, pp 547-554; see also Volume III, pp. 525-528); that this pattern of creating alleged loan obligations which were never honored or intended to be continued into the year 1964 when appellant acquired $4,000 in currency from Mr. Walter W. Fellman to whom appellant had represented that he was acting as the agent of the Hetty Marks Foundation for the acquistion of property in the area of Washougal, Washington (Vol. II, p. 359); that appellant falsely represented to Fellman that the Hetty Marks Foundation (which, in truth, was a "dummy corporation" with virtually no assets) was valued at "somewhere around four hundred million dollars" (Vol. II, p. 361); that appellant falsely represented to Fellman that he needed this $4,000 to finance a trip back to New York to meet "the Board of the Hetty Marks Foundation" allegedly for the purpose of obtaining Board approval for certain property acquisitions in the Washougal area (Vol. II, pp. 363, 367); and that appellant, who represented to Fellman that the money would be paid back "immediately" after the New York trip, never paid Fellman any money. (Vol. II, pp. 364, 367)

Moreover, appellant's attempt to conceal the receipt of taxable income in the form of a loan was strikingly demonstrated by the testimony of Robert Pearlman, a Washington attorney who — together with his family — visited with appellant in late 1961,

and testified as follows on direct examination as a government witness (Vol. III, p. 635):

> "Q Now, on that particular occasion at his home in October, 1961, did you have a discussion with him concerning Federal income taxes?
>
> "A Yes, we — that was one of the items that we ——
>
> "Q Will you give us the substance at that time of what was said by Mr. Marks?
>
> "A At that time he explained his method of operation as being he would get money from individuals and give a note back, with the understanding that the note was not to be collected on.
>
> "Q Did he say any thing else at that time? Did he say what he got the money for?
>
> "A Well, he was in public relations and as a lobbyist, and I would say an influence peddler.
>
> "Q Is that what he got the money for, according to Mr. Marks?
>
> "A Yes.
>
> "Q And did he say why he arranged his affairs in that manner?
>
> "A Well, he said this is one way that he didn't have to pay any tax on it."

In short, the record reveals a clear case of a pattern of fradulent conduct, "the likely effect of which would be to mislead or to conceal", condemned by the Supreme Court in *Spies v. United States,* 317 U.S. 492, 499. Appellant sought to conceal from the Internal Revenue Service the existence of taxable income and the extent of his financial operations. This was clearly indicated by the fact that he failed to report to his accountant all taxable receipts; his extensive use of currency, and the covering up of assets and income by the use of dummy corporations, *United States v. Chapman,* 168 F.2d 997, 999-1000, 1003 (C.A. 7th); *Schuermann v. United States,* 174 F.2d 397, 398 (C.A. 8th); *Spies v. United States, supra,* 499; *Chinn v. United States,* 228 F.2d 151 (C.A. 4th); and the disguising of taxable income in the form of loans. *Cohen v. United States,* 297 F.2d 760, 769 (C.A. 9th); *United States v. Beck,* 298 F.2d 622, 630 (C.A. 9th).

All of the above evidence which we have related is without regard to appellant's admissions to the Special Agent during the investigation that the monies received from Persons, Converse, Gross and Union Finance Company were for "services" rendered. (Vol. III, pp. 574, 578, 584, 597). It is clear, therefore, contrary to appellant's assertion in his brief (BR. 61-63), that these admissions to the Special Agent were

fully corroborated within the meaning of *Opper v. United States,* 348 U.S. 84, 91-92, and *Smith v. United States,* 348 U.S. 147, 154-155. [10]

In his brief, appellant conveniently ignores much of the above evidence and persists on appeal, as he did before the jury, in viewing the evidence only in the light most favorable to himself. Thus, appellant continues to portray himself as somewhat of an ignoramus with a sixth grade education who is "not good at figures." (BR. 2, 56) As shown by the above statement of the case, and our discussion herein, this portrayal is contrary to the evidence which revealed

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[10] Appellant, in his brief (BR. 62) also refers to the Government's alleged failure to corroborate statements made by him to various private individuals who were government witnesses in the case. While we believe that the evidence narrated above totally refutes appellant's argument, we note that two of these statement's by appellant to the witnesses Caldwell (Vol. II, p. 284) and Pearlman (Vol. III, p. 635) were made *prior* to the offense which was committed with the filing of the fraudulent 1961 income tax return on July 27, 1962 (Ex. 3), and hence need not be corroborated. *Ogden v. United States,* 303 F.2d, 724, 742. (CA 9) The statement by appellant to the witness Slavans (Vol. II, p. 418) referred to in appellant's brief (BR. 62), was made in 1964 and after the commission of the offense, Although the Court need not reach this issue since the evidence sufficiently corroborated this statement, we note that it is apparently an open question in this Circuit whether such post-offense admissions to someone other than an investigating agent fall within the corroboration rule. *Bryson v. United States,* 238 F.2d 657, 662 (C.A. 9). Other Circuits have held that the corroboration rule is applicable only to post-offense admissions made to law enforcement officials. *U.S. v. Winston,* 222 F. 2d 323, 326 (C.A. 7); *United States v. Stromberg,* 268 F.2d 256 (C.A. 2), *cert denied,* 361 U.S. 863 (1959).

appellant to be a highly shrewd manipulator of persons. As Judge Kilkenny noted, the record disclosed appellant to be "a common cheat and a complete fraud" who was so clever in perpetrating his fradulent schemes "that he ensnared not only the innocent, but also the 'sharpies'." (CT. 98)[11]

Indeed, appellant's claim that he is "not good at figures" and that income taxes are beyond his ken is specifically belied by his statements to various government witnesses that "he never paid taxes" (Vol. II,

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[11] In view of the jury verdict of acquittal on Counts II and III of the Indictmen, alleging willful attempted tax evasion for the years 1962 and 1963, we have carefully refrained from referring to any evidence concerning the circumstances under which appellant received money from government witnesses during those years. However, for purposes of appellate review, we believe that such testimony clearly remains relevant on the issue of whether appellant possessed the shrewdness and intelligence, as the government contended, to arrange his affairs in the form of "loans" for the dual purpose of inducing his victims to part with their money and to conceal income from the U. S. Government. As we have related above, appellant, at the trial, in our view feigned a naivete about business matters in testifying as follows: that he got to the middle of the sixth grade in school (Vol. IV, p. 784); that he had no training in arithmetic or figures (Vol. IV, p. 784); that he was "not at all" good at figures (Vol. IV, pp. 784-785); that he "sometimes get confused on figures" (Vol. IV, p. 786); that he didn't "understand figures" (Vol. IV, p. 788); and that he "truthfully couldn't" understand the material contained in the books mentioned in the next footnote (Vol. IV, p. 796). Again, without attempting to refer in detail to the remaining evidence in the case concerning monies paid over to appellant by other government witnesses in the years 1962 and 1963, suffice it to say that the entire record fully supports Judge Kilkenny's conclusion, and that of the jury, that appellant was at least bright enough to form the wilful intent to evade taxes.

p. 283); that preparing income tax returns was "one thing he knew how to do well" (Vol. I, pp. 214-215); that, after handing the witness Slavens certain "money-making" books,[12] appellant told Mrs. Slavens how "I could save this money after I made it rather than pay it all for taxes" (Vol. II, p. 418); and that he arranged his affairs so "that he didn't have to pay any tax." (Vol. III, p. 635).

Appellant also blandly asserts (BR. 20, 33) that he probably was "in error" and simply "made a mistake" in reporting as income a portion of the monies received from Morningstar and Converse. The jury, quite to the contrary, could, and no doubt did, conclude that appellant wilfully omitted from gross income the remaining monies received from Morningstar and Converse.

Appellant refers (BR. 18, 22, 29, 32) to various statements of government witnesses Morningstar, Gross, Persons, and Converse to the effect that they thought they were loaning money to appellant. While the Court is respectfully referred to the government's counter-statement of the case for a full review of the

[12] These books (Exs. 148A-148G) were variously entitled: "How To Legally Avoid Paying Taxes"; "How To Start Getting Rich"; "How To Make A Killing In Real Estate"; How To Scheme Your Way to Profit"; "Secrets of Banking & Borrowing"; "Pocket Guide to Daily Money-Handling (How To Keep From Being Cheated)"; and "Secrets of Speculation", all by Sidney Walton, and published by "Profit Re-$earch, Inc."

evidence on this issue of income versus loan, it is clear that resolution of this fact question depended as much, if not more, on *appellant's* intent to be bound by a loan obligation and to repay the money. *Cohen v. United States,* 297 F.2d 760, 767, 769 (C.A. 9). The trial Court correctly so instructed the jury (Vol. IV, pp. 945-946), and, as we have previously shown, the jury had ample evidence before it to resolve this question against appellant.

In further support of his loan argument, appellant refers (BR. 29) to the fact that he paid back some $2500.00 to Persons on the alleged loan of $5,000.00. The Court will recall that appellant had earlier rebuffed Persons' efforts to collect the alleged loan by claiming that the monies had been received for "services rendered", and appellant thereafter stated to Persons that he "didn't owe any money" to him. (Ex. 43; Vol. I, p. 91). It was only well after the commencement of the revenue investigation in August, 1964 (Vol. III, pp. 563-564), that appellant, for the first time paid over any monies to Persons beginning in June, 1965, with a payment of $500 (Vol. I, pp. 91-92; Def. Ex. 231). Indeed, shortly after he was contacted by the special agent, appellant acknowledged to the agent that the monies received from Persons were for services rendered. (Vol. III, pp. 574, 578, 584, 597). However, as the investigation progressed and no doubt as the theory of the government's

case became more evident, appellant shifted his position and asserted that the monies were received as loans (Vol. III, pp. 602-606). It was at about this time that appellant commenced his payments to Persons (Def. Ex. 231). No such payments, however, were made to government witnesses Minnie Woolworth or Walter Fellman, from each of whom appellant had obtained "loans" of $3,000.00 in 1958, and $4,000.00 in 1964, respectively, with the avowed promise of paying the money back (Vol. II, pp. 361-362, 364, 367; Vol. III, pp. 548, 552-554). Significantly, the years 1958 and 1964 were not included in the prosecution period and the jury could properly have concluded that the repayment to Persons was motivated by appellant's desire to either avoid or successfully defeat prosecution by again placing the transaction in the form of a loan.[13]

Finally, we note that the issue of appellant's credibility was sharply presented to the jury when appel-

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[13] The trial Court charged the jury on this point as follows: (Vol. IV, pp. 946-947)

"It is the intent at the time that the money was received that governs. With respect to what the defendant did after he received the money by way of paying it back to certain persons is one of the many circumstances that you may consider as to the intent. But in reaching a determination as to the significance of such subsequent acts, you must take into consideration any motive that the defendant may have had in making such payments consistent with his personal interest at the time, as distinguished from the act of keeping a commitment that he intended to be bound by from the date of the inception of the receipt of the money."

lant, on direct examination and contrary to the testimony of various government witnesses (see statement *supra* and previous discussion in this argument), denied that he told Floyd Persons that he was going to use the monies he received from Persons "to buy somebody off in Washington, D.C." (Vol. I, p. 80; Vol. IV, p. 812); denied that he had ever had any dealings with Donna Schmaltz, who had testified that appellant had told her that he wished to conceal certain papers from the Interstate Commerce Commission (Vol. III, pp. 534-536; Vol. IV, p. 811); denied that he had ever given any "money-making" pamphlets to Dorothy Slavens (Vol. II, p. 418; Vol. IV. p. 795); and stated that, on behalf of Floyd Persons, he did see Assistant Secretary Karl Landstrom at the Interior Department in Washington, D. C., in efforts to obtain government land in exchange for scrip (Vol. IV, p. 817; Vol. III, pp. 620-623). Considering these and other direct conflicts of testimony, and further considering the government's proof, which, as we have previously mentioned had already exposed the extent of appellant's fradulent schemes to defraud his creditors and the United States Treasury Department, the jury could well have concluded that appellant's loan defense, at least as to the year 1961, was a complete sham.

II

THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S ARGUMENT CONCERNING AN ALLEGED CHARITABLE CONTRIBUTION DURING THE YEAR 1961.

Appellant has presented an argument (Br. 34-35) that he is entitled to a deduction (presumably as a matter of law) for a certain charitable contribution of an alleged value of $2,500.00 which he made during the year 1961 to the Rainbow Division of Oregon City, Oregon. The basis for appellant's argument is contained in Def. Ex. 271, introduced through Mrs. Marks, which purports to be evidence of a charitable contribution by appellant in February, 1961 to the Rainbow Division of the Police Department of Gladstone, Oregon for distribution to the needy. According to the testimony of Mrs. Marks, the merchandise listed in this exhibit came from a secondhand store in Southeast Portland operated by appellant under the name M & M Salvage Company. (Vol. IV, pp. 748-750). Attached to the signed receipt on the face of this exhibit is what purports to be a six page inventory (but three of these sheets are simply duplicate copies of the other), dated October 25, 1960, of the M & M Salvage Company store in Southeast Portland. Mrs. Marks testified that this entire inventory was given to the Rainbow Division, that this inventory had a cost price of about $2,500.00 and that she had placed a value on this inventory at about the time of the

donation at the alleged "cost price" of $2,500.00. (Vol. IV, pp. 748-750). To rebut appellant's evidence of a $2,500.00 charitable contribution, the Government introduced into evidence (over defendant's objection) the 1960 corporate income tax return of the M & M Salvage Co. (Ex. 15), and the work sheet used by appellant's accountant, Mr. Kneeland, in preparing this return (Ex. 23A). Mr. Kneeland testified that the figures contained in the work sheet and listed on the return were based upon information received from appellant; that, in arriving at a figure for "cost of goods sold" of $603.50, Mr. Kneeland used a beginning inventory of $450.00, which was based on the preceding year's ending inventory valued at cost; that merchandise amounting to $153.50 at cost price was purchased during the year; and that, as of December 31, 1960, the value of the inventory left in the store was zero, since the "store had been sold and was no longer in the ownership of the M & M Salvage at the end of the year." (See Ex. 15, Schedule A; Vol. IV, pp. 903-906). It is clear that, on the basis of Mr. Kneeland's testimony and the documentary evidence produced by the Government, the jury was free to either totally reject the testimony of Mrs. Marks or to assign a mere nominal value to the merchandise donated. Contrary to Mrs. Marks' claim that the merchandise cost about $2,500.00, the corporate tax return disclosed a cost of only $603.50. (Ex. 15).

After the Government had introduced this testimony in rebuttal, Mrs. Marks again took the witness stand and stated that the inventory list did not include certain furniture and fixtures which were also allegedly donated. (Vol. IV, pp. 917, 919-920). The defense also introduced through Mrs. Marks a newspaper clipping (Def. Ex. 275) allegedly portraying the merchandise donated to the Rainbow Division. The newspaper clipping, while tending to confirm the testimony of Mrs. Marks that *some* merchandise (and not necessarily the merchandise listed in Def. Ex. 271) was given to the Rainbow Division, hardly was of sufficient probative force on the question of value to compel the jury to make a finding of anything more than a nominal value. Indeed, even if the jury gave credence to Mrs. Marks' later testimony concerning the alleged donation of furniture and fixtures, the corporate income tax return (Ex. 15) of the M & M Salvage Co. shows the year end value (as of 12/31/60) of such equipment to be only $401.00. (See Schedule G, Govt. Ex. 15.) Moreover, Mrs. Marks, on cross examination, stated that the merchandise and equipment in question was reposessed by the Marks in October, 1960, and admitted that "there could have been merchandise sold out of it after that." (Vol. IV, p. 920). Considering this admission of Mrs. Marks, and further considering that the corporate tax return, which was not filed until June 16, 1961 (Ex. 15), showed a year-end (as of 12/31/60) inventory

of zero, the jury could well have concluded that the merchandise was of such a poor quality as to be almost valueless. In short, even if we were to assume that the jury assigned some value to the charitable contribution testified to by Mrs. Marks, there was ample evidence to support the jury's verdict that such value was well below any amount needed to reduce the Government's unreported taxable income figure to a *de minimis* amount. The District Court was clearly correct in so holding (CT 100-101).

We note, moreover, that the burden of proving the charitable contribution was on the appellant. As testified to by the appellant's expert witness, Mr. Mitchell, appellant's deductible expenses, as shown on the schedule prepared by Mr. Mitchell (Def. Ex. 257), was discussed with Mrs. Marks. (Vol. IV, p. 892). While Mr. Mitchell testified that Mrs. Marks had mentioned this alleged charitable contribution to him in the course of his preparation of this expense schedule, this deduction was not listed in this schedule (Def. Ex. 257) which contained approximately $40,000 in other expense deductions, and which was furnished to the Government prior to trial in an effort to dissuade prosecution. (Vol. IV, pp. 892-893) The first time the Government learned of this item was at the trial at the time Mrs. Marks testified. Accordingly, since appellant never claimed this alleged deduction on his 1961 tax return, and since no "lead" was pro-

vided by the taxpayer, the burden was on the appellant to show that he had deductions in addition to those claimed by him on his return. *Beck v. United States,* 298 F. 2d 622, 632 (C.A. 9); *Elwert v. United States,* 231 F.2d 928, 933 (C.A. 9).

Finally, on this point, appellant refers (Br. 40) to certain affidavits which he submitted to the lower Court in support of a motion for "judgment of acquittal." Since these affidavits were submitted after trial, the District Court more properly treated the affidavits as in support of a motion for new trial under Rule 33 (Federal Rules of Criminal Procedure) rather than in support of a motion for judgment of acquittal. It is fundamental that a motion for new trial is addressed to the discretion of the District Court and has to meet the following requirements:

> "(1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal." *Pitts v. United States,* 263 F.2d 808, 810 (C.A. 9); *Fiorito v. United States,* 265 F.2d 658 (C.A. 9).

After carefully considering the affidavits filed by appellant (CT 18-29, 34-70, 78-82, 88-97), and the Government's opposition (supported by counteraffidavits) to the motion for new trial (CT 79-97), the District Court held as follows (CT 101):

> "I have carefully considered the voluminous briefs filed by counsel for defendant and have analyzed the cited cases. I am convinced that the case was properly submitted to the jury and that defendant had a fair trial. The alleged newly discovered evidence was obviously available to the defendant at the time of trial. Moreover, such evidence would be only repetitive of that already in the record.
>
> "Therefore, the defendant's motion for a judgment of acquittal and, in the alternate, for a new trial, must be denied."

We respectfully suggest that appellant's brief on appeal (Br. 40-45) totally fails to demonstrate how it was an abuse of discretion for the District Court to deny the motion for new trial. Appellant, in his brief, has simply summarized the affidavits presented to the District Court to support his argument that the "Rainbow Division", the alleged recipient of the donation, was organized and operated "exclusively for charitable purposes" within the meaning of Section 170 of the Internal Revenue Code of 1954. Assuming *arguendo* that such was the case, these affidavits

added nothing of substance to the only issue which, at the post trial stage, might have been material to the case, viz: the fair market value of the goods at the time of the donation in February, 1961. The Trial Court properly denied this motion.

III

THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT PROVED A SUBSTANTIAL TAX DEFICIENCY.

Appellant claims (Br. 49-53) that the evidence failed to show a "substantial" tax deficiency for the year 1961, and that the additional tax proven by the government was *"de minimis"*.

We note initially that the District Court carefully instructed the jury on the meaning of the term "substantial" as follows (Vol. IV, pp. 940-941):

> "Now, the meaning of the word 'substantial,' as here used, depends upon the facts, circumstances, and conditions as shown by the evidence as to each particular count. Any amounts of unreported taxable income or tax greater than sums relatively small, under the particular circumstances pertaining thereto, are substantial.

> "Any amounts of unreported taxable income or taxes should be disregarded which reasonably may be accounted for as due to error, oversight, or as reasonably considered inconsequential by a taxpayer."

Appellant did not and legitimately could not offer any exception to the Court's charge, and the jury—by its verdict—obviously concluded that the Government had proved a substantial tax deficiency.

To the extent that appellant's argument is based on the proposition that the proven deficiency was not substantial as a matter of law, it is clearly without merit. The Government's evidence established that appellant's taxable income for the year 1961 amounted to $1,877.43 with a resultant tax liability of $375.49. Appellant, in his 1961 individual income tax return, reported a negative taxable income of $178.91 and no tax liability. (Ex. 3) The Court will also recall (see statement, *supra*) that appellant reported negative taxable income figures and no tax liability in the year 1961 in the corporate returns of the Royal Acceptance Corporation and the Hetty Marks Foundation (Ex. 7, 17), the income and expenses of which were attributed to appellant individually by both sides. At the trial, appellant contended that in fact he sustained even greater tax losses (amounting to a negative taxable income of $8,246.30 (Def. Ex. 258)) than claimed by him on his returns due to the existence of cer-

tain additional alleged expenses which were not claimed on his 1961 tax return. The Government, following the principle announced in *United States v. Beck,* 298 F.2d 622, 632 (C.A. 9), allowed every single item of expense claimed by appellant (Vol. IV, pp. 876-879, 888-893; Ex. 154),[14] and still proved additional unreported income amounting to $2,056.34.[15]

While it is true that the amount of this unreported income is not very large when considered *in vacuo,* we submit that it is more than "substantial" under the circumstances of this case and under the definition of "substantial" set forth in the decided cases. This Court has recently affirmed a judgment of conviction in the tax evasion case of *United States v. Heider,* 347 F.2d 695 (C.A. 9), wherein the District Court noted (231 F. Supp. 223, 235-236 (D.C. Ore.)):

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[14] The only difference between the Government's expense figures, and those of appellant, consisted of an additional $476.51 in medical expenses claimed by appellant as the amount which constituted in excess of 3% of adjusted gross income. Appellant's expert witness agreed that this additional amount would be allowed only if the jury accepted appellant's contention that he had no adjusted gross income. Otherwise the Government's medical expense figure – based upon the adjusted gross income computed by the Government – would be correct. (Vol. IV, pp. 876-879, 888-893).

[15] Appellant's corrected taxable income of $1877.43 plus negative taxable income of $178.91 reported by him on his 1961 tax return amounts to additional taxable income of $2056.34.

> "The proof showed beyond any doubt that the defendants attempted to cheat the Government by wilfully understating Heider's net income. The Government concedes that in order to find the defendants guilty, I must find that Heider owed a tax.
>
> "In my view, if a taxpayer reports a large loss when he has a net taxable income which he wilfully failed to divulge, he is guilty of a a violation of the income tax law *even though the amount of the net taxable income is comparatively small.* United States v. Nunan, 2 Cir. 1956, 236 F.2d 576, 585."
> [Emphasis supplied.]

In the *Nunan* case, referred to by the District Court above, the Second Circuit—after reviewing the evidence pertaining to the Government's proof of a substantial tax deficiency—offered the following cogent comments on this point (at pp. 585-586):

> "None of these items can be considered *in vacuo*. Nor does the sum of them tell the story. Viewed in perspective against the background of the case as a whole we cannot say that the evidence required a ruling that the jury must render a verdict of acquittal. The showing by the government must warrant a finding that the amount of the tax evaded is substantial. Tinkoff v. United States, 7 Cir., 86 F.2d 868; United States v. Schenck, 2 Cir., 126 F.2d 702; Graves v. United States, 10 Cir., 191 F.2d 579. But this is not measured in terms of gross or net income nor by any particular per-

> centage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration. Here the total gross income reported by appellant in 1946 was $67,823.57 and in 1950, $143,239. But a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution, depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax law with impunity.
>
> * * *
>
> "*** each tax evasion case must rest on its own bottom. This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. It is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense."

In line with the *Nunan* and *Heider* decisions, there are several other tax evasion cases involving relatively small amounts in which convictions have been upheld where (as here), the understatements were considered on a percentage basis and held to be substantial.

In *Janko v. United States,* 281 F.2d 156, 163 (C.A. 8), reversed on other grounds 366 U.S. 716, the defendant had improperly claimed dependency exemptions for minor children living with his divorced wife.

The tax evaded was $134.00 in 1954 and $264.00 in each of the following two years. Janko contended that the evasion was not substantial because the dollar amounts were small. His conviction on the first count was reversed on other grounds, but the Court of Appeals sustained Janko's conviction for 1955 and 1956. The Court held that "on a percentage basis the amount involved is large" (at page 163). Since Janko had reported a tax of $549.00 and $450.00 for 1955 and 1956, respectively, he had evaded approximately 32% and 37% of his correct tax for the years involved.

In another case (*United States v. O'Day,* 186 F. Supp 572 (D. Del.), the indictment charged that the defendants filed a return reporting an income tax of $218.00, whereas $2,956.84 was actually due. At the trial the government offered proof that the correct liability was only $992.50. The defendants admitted a liability of $895.42. The District Court denied a motion for acquittal, holding that the variance between the tax liability charged in the indictment and the amount proved at the trial was not fatal. The Court said that "a conviction may be sustained if a taxpayer willfully attempts to evade or defeat any substantial portion of the tax." (at pp. 573-574).

In *United States v. Cindrich,* 140 F.Supp 356 (W.D. Pa.), affirmed 241 F.2d 54, 57 (C.A. 3), where the

reported tax was much greater than in the cases just discussed, the Court also indicated that a percentage approach is important. Cindrich's reported gross receipts of $133,111.77 did not include ten checks totalling $4,689.60. He should have paid $9,124.78 in taxes, but paid only $7,182.78, the underpayment being somewhat over 20% of the correct tax, and the District Court concluded that the deficiency was substantial. See also *Gendelman v. United States,* 191 F.2d 993, 996 (C.A. 9), *cert. denied* 342 U.S. 909; *Goldbaum v. United States,* 204 F.2d 74, 78 (C.A. 9), *cert. denied* 346 U.S. 831; *Canaday v. United States,* 354 F.2d, 849 (C.A. 8).

In the instant case, appellent reported no tax due and owing (and a negative tax liability) for the year 1961 when in fact his tax liability amounted to $375.49. In short, appellent evaded well over 300% of his correct tax for that year, which is clearly "substantial" under the rationale of the decided cases.

We note, moreover, that the requirement of a "substantial" tax deficiency had its beginning in the net-worth type of case where the Government seeks to prove tax deficiencies by a circumstantial, indirect method of proof. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, there is a serious

danger that errors could arise (such as in the area of depreciation, opening net worth, cash on hand, etc.) which would make the net worth increases more apparent than real. No such dangers are present in the ordinary "specific-item" type of case, such as here, where the Government simply seeks to show an omission from income of definite items in certain amounts from ascertainable sources. We believe that this is what the Second Circuit, in the *Nunan* case, supra, had in mind when, in affirming a tax evasion conviction in a specific item case, it stated (236 F.2d at p. 586):

> "This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. It is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense."

By the same token, the Eighth Circuit, in the *Janko* case, *supra,* in affirming that specific item conviction, noted that the defendant's argument concerning the lack of a substantial tax deficiency "was directed to a net worth case and necessary intent" (281 F.2d at p. 163).

Finally, on this point, it is interesting to note that the District Court—in the *Cindrich* case, *supra,* in up-

holding a conviction in a specific items case where the amount of tax evaded was comparatively small, squarely held (140 F.Supp at p. 360) that "a substantial deficiency in net income is not required" in a specific item case and that "only in cases where the proof of the felony is circumstantial, such as in net worth cases where the gross income is approximated, is it necessary to show that a substantial amount was omitted from the reported income. Cf. *Leeby v. United States*, 8 Cir., 1951, 192 F.2d 331." In affirming this conviction, the Fifth Circuit significantly held as follows (241 F.2d 57):

> "Appellant also urges the District Judge erred in refusing to charge the following request:
>
> "'Where a taxpayer engaged in business has reported a large sum as gross receipts of such business but has failed to report a small amount of additional receipts, the smallness of the unreported receipts in itself gives rise to an inference that the failure to report the additional receipts was not done willfully.'
>
> "The amount of deficiency is not a consideration on the question of the guilty knowledge or the intent element of the crime, *although it may be an important element where the deficiency itself is in issue as in a net worth prosecution.* The issue before us is not whether the defendant defrauded the government of a substantial sum but whether the deficiency

was due to fraud. The disparity between total receipts and the amount of income unreported is not helpful on that problem. In many business enterprises net income represents a very small percentage of total receipts and the above instruction suggests the strange proposition that the failure to report income justifies an inference of the good faith of the defendant. Generally that type of instruction is not demandable as a matter of right, United States v. Pannell, 3 Cir., 1949, 178 F.2d 98. In this trial it would have been affirmatively wrong and the trial judge properly denied it. A review of the instructions on wilfulness and fraudulent intent indicates appellant was accorded the full measure of his rights as defined in Spies v. United States, supra. Holland v. United States, supra, and its companion decisions. This case was properly submitted to the jury under the charge of the court." [Emphasis supplied.]

In sum, there is authority for an argument that the concept of a substantial tax deficiency has no application in a specific items case. However, we respectfully submit that the Court need not reach this issue since the deficiency in the instant case — as previously shown — is entirely adequate to sustain the conviction.

IV

THERE WAS NO ERROR IN FAILING TO INFORM THE JURY OF THE APPLICABLE RATE OF TAX

Appellant asserts (Br. 45-49) that a new trial is required since the jury was not informed of the tax rate to be applied in computing the tax deficiency. More specifically, appellant asserts that the jury may have found an unreported taxable income figure less than that proved by the Government, and alleges that in such a case the jury would not have been able to apply the appropriate rate of taxation to this unreported income in order to arrive at a tax deficiency. The point is without substance.

We note initially that appellant did not raise this point at any time during the trial. Appellant neither cross-examined the Government's expert witness, Mr. Klass, on the applicable rate of taxation nor requested a jury instruction on the rate to be applied to either the Government's unreported income figure or any lesser amount. Accordingly, the Trial Court rejected this argument raised below in appellant's motion for a new trial as follows (Ct. 99):

> "One of the defendant's principal complaints is that the Court did not inform the jury on the tax rate to be applied in computing the tax deficiency. It is evident that neither the

> Government, nor defendant's counsel, were of the belief that these schedules and rates should be submitted to the jury. No requested instructions on that point were submitted, nor was the question in any way raised by the defendant. Obviously, at the time of the trial, all participants, including the Court, felt that the tax deficiency, if any, was a subject for expert testimony. Manifestly, the theory that the rate schedules should have been submitted to the jury is an afterthought on the part of counsel for defendant. The trial of the case consumed in excess of five days. I do not believe that the defendant should be now permitted to raise this question."

Since the matter was not raised at the trial, it is fundamental that appellant—to obtain a new trial—must fall within the "plain error" provision of Rule 52, Federal Rules of Criminal Procedure, which provides that:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

We submit that no error exists and that, in any event, no prejudice requiring the operation of this rule has been or can be shown in the circumstances of this case.

First, we will conjecture with the appellant and will assume *arguendo* that the jury may have arrived at a lower unreported taxable income figure than that

claimed by the Government. Given this assumption, appellant is presumably arguing that it was incumbent upon the Government to pursue either of two alternatives: (1) introduce through its expert witness calculations of tax deficiencies with respect to every possible amount of unreported income between zero and the amount of unreported income claimed by the Government; or (2) inform the jury of the relevant tax bracket (in this case twenty percent) and let the jury perform the multiplication with respect to the unreported income found. We respectfully suggest that the first alternative is absurd on its face, and that the second alternative was solely a matter of defense. When the Government rested its direct case, the jury had before it sufficient evidence to conclude that a *prima facie* case had been established, i.e., that the appellant had wilfully attempted to evade a substantial portion of his taxable income and tax. At that point, it was up to the appellant to come forward with evidence to show that the Government had overstated his taxable income. This the appellant did by his claim that a great portion of the monies received constituted loans and not income and his futher claim of an alleged $2,500.00 charitable contribution. To the extent that the jury may have believed any of the defense evidence, it is clear that the Government's unreported income figure would have been reduced accordingly. While the jury—by its verdict—obviously

rejected the appellant's proof, the point we are making is that it was incumbent upon the appellant to prove that he had a lower unreported taxable income (or no taxable income at all) than that claimed by the Government. Indeed, defense counsel repeatedly stressed to the jury throughout the trial that if it found certain of the items to be loans, the defendant's taxable income would be either entirely wiped out or reduced to *de minimis* amounts. In short, it was up to the appellant to inform the jury of the rate of taxation to be applied to any lower unreported income figure it may have determined to be due.

Second, the only case we have found in which this issue was raised holds squarely against appellant's position herein. In the case of *Watts v. United States,* 212 F.2d 275 (C.A. 10),[16] the Government introduced evidence at trial establishing substantial unreported income but did not introduce any evidence, expert or otherwise, to show the additional tax which was due and owing based on the unreported income. On appeal, the defendant contended that this failure to inform the jury of the additional tax due was error. The Court of Appeals rejected this argument as follows: (at p. 277):

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[16] This case was remanded by the Supreme Court on other grounds for further consideration in 348 US 905, and the conviction was again upheld n 220 F.2d 483, cert. den. 349 US 939.

> "It was not necessary that the Government introduce evidence as to the exact amount of the additional tax due. To make a case for the jury, it was sufficient that the Government present substantial evidence from which the jury could find that a substantial amount of net income was not reported and that the failure to so report it was wilful and intentional. *When once that was established, the amount of the additional income tax remained unimportant because it would follow as a matter of course that a substantial amount of additional tax remained due and unpaid.* The exact amount of such tax was not an essential element of the offense with which appellant was charged." [Emphasis supplied.]

In the instant case, unlike *Watts,* the jury had before it expert testimony on the amount of the additional tax due over that reported by appellant on his 1961 tax return. It would therefore follow *a fortiori* from *Watts* that there was no requirement to also inform the jury of the applicable rate of tax.[17]

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[17] We have examined the appellate record in the *Watts* case (No. 4736 — C.A. 10 — filed September 18, 1953), which reveals that the jury was not informed of either the additional tax owed by the defendant or the applicable tax rate. The jury had before it only the amount of additional net income claimed by the Government. The District Court in that case charged the jury as follows: (R. 246)

> "It is not necessary, ladies and gentlemen of the jury, that the government prove the amount of understatement here alleged in the indictment exactly. It is enough if you find that the income was understated in a substantial amount, any substantial amount.
>
> "Neither is it necessary, ladies and gentlemen of the jury, for the government to tell you exactly what is the

We believe that the case of *United States v. Nunan*, 236 F.2d 576 (C.A. 2), also supports the Government's position. In that case, the appellant (who was convicted of tax evasion) contended on appeal that the Government's evidence failed to support a finding that numerous cash bank deposits and disbursements made by him during the prosecution years constituted taxable income. The Court of Appeals rejected this argument as follows (236 F.2d at pp. 585-586):

> "Here, even if the jury had been unable to agree with the contentions of the government to the effect that the cash deposits and disbursements constituted, to the extent alleged, taxable income, still a verdict of guilty would have been warranted by the proof of specific unreported items, viewed in the light of the evidence taken as a whole.
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> * * *

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tax which would result from that understatement, because the tax follows as a matter of law from a determination of whatever income was earned which should have been reported."

It is evident, therefore, that the above italicized language of the Court of Appeals in *Watts* is a necessary holding in the case and not simply *dicta*.

We point this out for the benefit of appellant's counsel as well as the Court since, in the haste of preparing a memorandum on this point in the lower Court, we did not have time to obtain the appellate record in *Watts*, and we erroneously informed opposing counsel that the language in question was only *dicta* in the case.

We might point out to the Court that in the numerous tax evasion cases tried in this and other circuits, the jury is not apprised of the tax rates and the calculations of both the unreported income and tax are made by the respective expert witnesses for both sides.

> "* * * each tax evasion case must rest on its own bottom. This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. *It is not necessary to prove that there was a particular amount of tax evaded* nor need the computations be exact in an accounting sense." [Emphasis supplied]

In short, the Second Circuit had no difficulty in trusting the jury to determine an ultimate substantial tax deficiency—even if the jury arrived at a lesser unreported income figure than that claimed by the Government. Again, the Second Circuit stressed that the important feature was the understatement of taxable income and tax and not the "particular amount of tax evaded".[18]

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[18] The *Nunan* case involved evasion of taxes for the years 1946 to 1950, inclusive. An examination of the appellate record in the *Nunan* case (No. 43078 - C.A. 2) at pages 604-621 and 1145-1159 reveals that the jury in that case did not have before it the rates of taxation to be applied to the unreported income for the years 1946, 1947, and 1948. For the years 1949 and 1950, the Government's expert witness, in answer to an inquiry from the Court concerning the tax "bracket" of the defendant, stated that he did not have the tax rate tables with him in Court and hence could not answer the question precisely. The prosecuting attorney in that case stated that, from his examination of the taxable income, the brackets for those two years appeared to be about 70% and 66%, respectively. These comments of the prosecuting attorney were offered only with respect to the taxable income proven by the Government for the years 1949 and 1950, and not with respect to any lesser taxable income figure claimed by the defendant.

Finally, we believe that it is appropriate to note, as stated in *Leeby v. United States,* 192 F.2d 331, 334 (C.A. 8), that tax evasion prosecutions are not proceedings to collect the amount of tax alleged to be due, and it is not necessary to determine the exact amount of the defendant's income for the years in question. All that the Government need show is that a substantial amount was omitted from reported income. To the same effect see *Fischer v. United States,* 212 F.2d 441, 443 (C.A. 10); *Watts v. United States,* 212 F.2d 275, 277 (C.A. 10); *Smith v. United States,* 236 F.2d 260, 264 (C.A. 8); *Montgomery v. United States,* 203 F.2d 887, 892 (C.A. 5); *Graves v. United States,* 191 F.2d 579, 582 (C.A. 10); *Gendelman v. United States,* 191 F.2d 993, 996 (C.A. 9). In the instant case, the jury had before it evidence that appellant had omitted over $6300.00 from gross income, and after the allowance of every deduction claimed by him (Vol. IV, pp. 876-879, 888-893), still had additional unreported taxable income of over $2,000.00. Had the jury found a lower unreported income, and had it been troubled in seeking what rate to apply, it could readily have requested an additional instruction or other assistance from the Court which could then have simply instructed the jury as a matter of law concerning the appropriate rate.[19] No such assistance

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[19] We note, moreover, that the jury did request the Court's advice on another matter during their deliberations. (Vol. IV, p. 967).

was requested by the jury. Jurors are also taxpayers, and as such are generally familiar with rates of income taxation particularly (as here) in the lower tax brackets, and, in any event, as people of affairs and intelligence would know that an unreported taxable income gives rise to an unreported tax liability. In short, we respectfully note our agreement with the general proposition expressed by the Supreme Court that we should not lightly accept an argument which "tacitly assumes that juries are too stupid to see the drift of evidence." *United States v. Johnson,* 319 US 503, 519.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: ..... day of November, 1967.

NORMAN SEPENUK
Assistant United States Attorney